BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSS E. GILDERSLEEVE	)	
Claimant	)	
	)	
VS.	)	
	)	
PETERSON MECHANICAL, INC.	)	
Respondent	)	Docket No. 1,023,753
	)	
AND	)	
	)	
WESTPORT INSURANCE CORP.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) and claimant requested review of the April 12, 2007, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Roger A. Riedmiller, of Wichita, Kansas, appears for claimant. Matthew J. Schaefer, of Wichita, Kansas, appears for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered a compensable back and left leg injury while working for respondent on July 17, 2003, and that a timely written claim was made. Accordingly, the ALJ awarded claimant temporary total disability (TTD) compensation for the period from January 21, 2005, to December 26, 2005. The ALJ also ordered respondent to reimburse claimant's attorney for the cost of unauthorized medical in the amount of $500. However, the ALJ terminated TTD as of December 26, 2005, and denied claimant's request for additional medical care because she found that an intervening injury had occurred on December 27, 2005. There appears to have been an issue concerning the payment of medical bills claimant incurred in 2003 that were not paid by respondent, but those bills were not specifically addressed in the ALJ's order and have not been raised as issues in this appeal.

The record is the same as that considered by the ALJ and consists of the transcript of the August 10, 2006, Preliminary Hearing and the exhibits; the deposition testimony of claimant taken August 11, 2005, the deposition testimony of Mark Peterson taken July 26, 2006; the deposition testimony of Merlin Porter taken July 26, 2006, and the deposition

testimony of Candy Spangenberg taken on July 26, 2006, and the exhibits, together with the pleadings contained in the administrative file.

By statute, preliminary hearing findings, conclusions and orders are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to having been determined by the entire Board, as it is when the appeal is from a final order.[2]

ISSUES

Respondent and its insurance carrier contend that claimant failed to provide a timely written claim pursuant to K.S.A. 44-520a(a). Respondent argues that after claimant's authorized medical treatment ended in August 2003, claimant did not request additional benefits from respondent or file a written claim until June 2005. Respondent also contends that claimant suffered subsequent intervening accidents which cut off claimant's right to any additional preliminary benefits. Although the ALJ found that claimant aggravated or sustained a new injury on December 27, 2005, respondent argues that claimant, in fact, suffered an intervening injury while working for Peterson & Associates in late 2003, after driving a tractor in March 2005, and again while working for White Tornado Cleaning Service in June 2005. Respondent also argues that claimant's appeal of the ALJ's denial of medical benefits is outside the Board's jurisdiction and should be dismissed. In the event the Board determines it has jurisdiction to consider claimant's appeal, respondent asserts that although Dr. Richard Preston's report indicates that claimant's back condition prevents him from doing significant manual labor, claimant is able to perform other work. Therefore, claimant is not temporarily and totally disabled and is not entitled to TTD benefits.

Claimant argues that he did not suffer any intervening injuries and, therefore, the ALJ's Order should be modified to include additional TTD and medical care. Claimant also argues that written documentation in the form of medical bills, off-work slips, and an ER instruction sheet were submitted to respondent on behalf of claimant by respondent. He contends that these submitted writings, especially the ER instruction sheet, which had been signed by claimant, satisfy the requirement of a written claim for compensation.

The issues for the Board's review are:

(1) Did claimant provide a timely written claim for compensation?

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[1] K.S.A. 44-534a.

[2] K.S.A. 2006 Supp. 44-555c(k).

(2) Did claimant suffer an intervening accident?

FINDINGS OF FACT

Respondent is a commercial plumbing business, and claimant was employed full time as a plumber. On July 17, 2003, claimant was installing a 700-pound ventilator. He was working alone, and had to pick up one end of the unit and move it and then go over to the other end of the unit and move it, in effect walking the unit to the wall. When he completed the task of moving the unit and mounting it to the wall, he bent over to pick up a bucket of water and felt pain in his low back from the middle of his back down to his left hip and on down to his left ankle.

Claimant found some coworkers, who took him to Clara Barton Hospital. Claimant called respondent's secretary, Candy Spangenberg, to report the accident, but she had already been informed of the incident by the job foreman, Eli Miranda.

Claimant was sent to one month of physical therapy by the hospital. He continued treatment with Dr. Cameron Knackstedt and Clifford Frink, a nurse practitioner, both with Clara Barton Medical Center. On August 5, 2003, claimant told his physical therapist that he wanted to return to work. On August 18, 2003, claimant was released to return to work with no restrictions. Claimant returned to work for respondent performing the same job tasks as before his injury. On about August 20, 2003, claimant was laid off because of lack of work.

Claimant admitted he never made a written request to Ed Peterson, owner of respondent, to receive medical treatment for his back until June 2005. However, claimant gave Mr. Miranda an ER instruction sheet from Clara Barton Hospital dated July 17, 2003, which he had signed. He also gave Mr. Miranda off-work slips that he received from Dr. Knackstedt's office. Claimant had asked Ed Peterson if he could give the slips to Mr. Miranda, as it was convenient for him to do so. Ms. Spangenberg, respondent's secretary, testified that she never received any paperwork from claimant concerning his workers compensation claim. All copies of bills and work-release slips that she forwarded on to the insurance carrier had been received by her from the medical providers. She specifically remembered receiving a work-release slip dated July 17, 2003, from the doctor's office. Ms. Spangenberg has no memory of submitting any letters regarding claimant's outstanding medical bills after May 28, 2004, when she submitted a bill from Clara Barton Hospital for an emergency room visit of November 11, 2003.

After being laid off from work from six weeks to two months, claimant went to work for Peterson and Associates, a commercial plumbing business owned by Mark Peterson, the son of Ed Peterson. Claimant performed some of the same job tasks he had been doing for respondent. He worked on a project at a building in Larned and also at a Walmart store. Claimant testified, however, that he had to climb very few ladders, did not have to work with his hands above his head, and did not have to carry anything that

weighed over 50 pounds while working for Peterson and Associates. He claimed that Mark Peterson knew he had a back injury and "babied" him, hiring laborers to help him with the heavy work.[3]

Mark Peterson, however, testified that he had no knowledge of claimant's back injury and would not have hired him if he had known. He did not baby claimant and did not hire laborers to do claimant's heavy work. Claimant performed the same duties all the other employees did, and Mark Peterson made no accommodations for him.

Merlin Porter, the project supervisor at the Walmart store site, also did not know about claimant's back injury. He also did not baby anyone and did not hire anyone to do the heavy work for claimant. Mr. Porter did not recall ever seeing claimant stand back and watch while someone else worked. Claimant never asked for lighter duties or accommodated work. Mr. Porter said that claimant was more of a laborer than a plumber at the Walmart job. Mr. Porter personally saw claimant working jumping jack packers and sand packers while on the Walmart job. These machines are physically demanding and jarring to the operator.

Claimant worked for Peterson and Associates until December 27, 2003. During that time, his low back discomfort never went away but stayed the same as it was when he was released to return to work in August 2003. On December 27, 2003, he quit because of complications of hepatitis C. In January 2004, he was still experiencing discomfort and went to see Ed Habash, a physicians assistant with Dr. Richard Preston's office. But Mr. Habash was more concerned about treating claimant's hepatitis than his back problems, although Mr. Habash did prescribe some Lortabs.

There is no January 2004 office note in the records from Dr. Preston or Ed Habash. Those records begin with a note dated October 21, 2003, and concerns only claimant's problem with hepatitis. The next office note is dated February 14, 2005, and again concerns claimant's hepatitis but also mentions a pending workers compensation claim for a back injury with dysesthesia in his legs. A telephone message from claimant to Dr. Preston's office on March 15, 2005, indicates claimant "says he has been driving a tractor and his back is hurting. Would like some pain pills."[4] Claimant testified that although he did drive a tractor, it was an air ride tractor and rode comfortably. He said that his back was sore for a couple of days, and he called the doctor's office only because he was out of pain pills.

On December 27, 2005, claimant was seen by Dr. Preston. Dr. Preston's office note on that date indicates: "This is an acute visit. . . . Apparently he re-aggravated his back

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[3] Gildersleeve Depo. at 17.

[4] P.H. Trans., Resp. Ex. 2 at 4.

attempting to move a recliner chair over the weekend. He has marked muscle spasm, loss of lumbar lordosis and flexion movements are severely limited."[5] Claimant did not know why the medical record noted that it was an acute visit and said he only went to the doctor for the pain medication. He claims he only irritated his back moving the recliner and his back pain had gone back down to the level it was before in about a day and a half.

A letter signed by Dr. Preston dated January 21, 2005, states that claimant's back condition prevents him from doing "significant manual labor."[6]

Claimant tried to work for White Tornado Cleaning Service in June 2005. Although he was accommodated at this job, some of the tasks he was asked to perform would irritate his back. When he stopped working for White Tornado Cleaning Service, his back returned to the condition it was before.

Claimant was seen by Dr. Pedro Murati, a board certified independent medical examiner, on July 10, 2006, at the request of the claimant's attorney. Dr. Murati opined: "This patient's current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on 07-17-03 during his employment with Peterson Mechanical, Inc."[7]

PRINCIPLES OF LAW

K.S.A. 520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-557 states in part:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any

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[5] *Id.*, Resp. Ex. 2 at 3.

[6] *Id.*, Cl. Ex. 3.

[7] *Id.*, Cl. Ex. 2 at 6.

> employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
>
> . . . .
>
> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

A written claim for compensation need not take on any particular form, so long as it is, in fact, a claim.[8] Furnishing medical care to an injured employee is the equivalent of an employer paying compensation under the Act.[9] In determining whether medical care is compensation under the Act, the question is whether the medical care was authorized by the employer, either expressly or by reasonable implication.[10] If an employer is on notice that an employee is seeking treatment on the assumption that treatment is authorized by the employer, the employer is under a duty to disabuse the employee of that assumption if the employer expects the 200-day limitation to take effect.[11]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[12] The test is not whether the accident causes the condition, but whether the accident aggravates or

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[8] *Lawrence v. Cobler*, 22 Kan. App. 2d 291, 294, 915 P.2d 157, *rev. denied* 260 Kan. 994 (1996).

[9] *Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App. 2d 383, Syl. ¶ 1, 642 P.2d 574 (1982).

[10] *Id.* at Syl. ¶ 2.

[11] *Shields v. J.E. Dunn Constr. Co.*, 24 Kan. App. 2d 382, 385-86, 946 P.2d 94 (1997).

[12] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

accelerates the condition.[13] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[14] When a primary injury is shown to arise out of and in the course of employment, every natural consequence flowing from that injury, including new and distinct injuries, are compensable so long as they are the direct and natural consequence of the primary injury.[15]

In *Casco*,[16] the Kansas Supreme Court stated: "A factfinder cannot disregard undisputed evidence that is not improbable, unreasonable, or untrustworthy. Such evidence must be regarded as conclusive."

The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[17] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[18]

ANALYSIS

There is no evidence in this record as to whether respondent filed an accident report with the Division of Workers Compensation. Therefore, claimant has failed to show that the time for making written claim was extended from 200 days to one year. Respondent last provided medical treatment on August 18, 2003. Accordingly, claimant was required to make a written claim upon respondent within 200 days of August 18, 2003. Two hundred days from August 18, 2003, is March 5, 2004. Claimant's uncontradicted testimony is that shortly after his accident in July 2003, he presented his supervisor, Eli Miranda, with an ER instruction sheet, which claimant had signed, and off-work slips, with the intention of receiving workers compensation benefits, *i.e.*, the furnishing of medical treatment, payment of his medical bills and temporary disability compensation. The

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[13] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[14] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

[15] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[16] *Casco v. Armour Swift-Eckrich,* __ Kan. __, 154 P.3d 494, *reh. denied* (2007).

[17] K.S.A. 2006 Supp. 551.

[18] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

delivery of these written documents to respondent for the purpose of receiving workers compensation benefits satisfies the requirement of making written claim for compensation.

Based upon the record presented to date, claimant has established a compensable injury with no specific intervening accident or injury that would terminate respondent's obligation to provide medical treatment. And although it seems unlikely that claimant would have been able to perform the subsequent heavy manual labor jobs with the type of injury claimant describes, the only expert medical opinion regarding causation, that of Dr. Murati, relates claimant's current condition to the July 17, 2003, work-related accident.

CONCLUSION

Written claim was timely made.

Respondent has failed to prove that claimant suffered a specific intervening injury.

The determinations of whether claimant is temporarily and totally disabled and whether claimant is in need of additional medical treatment are issues for the ALJ and are not subject to review by the Board on an appeal from a preliminary hearing order.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 12, 2007, is modified to find no intervening injury but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2007.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge